No. 374

MAR 22 1948

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Supreme Court of the United States

October Term, 1948.

FRANK ANDREWS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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FRANK ANDREWS,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT CERTIORARI.

I.

HISTORY OF THE CASE.

The Grand Jury of Hamilton County, Ohio, at the January, 1945 Term of Court returned an indictment reading as follows:

> "That Frank Andrews, alias Frank Andriello, alias Screw Andrews on or about the 29th day of December in the year nineteen hundred forty-four at the County of Hamilton and State of Ohio, aforesaid, did unlawfully promote and carry on a scheme of chance known as 'policy' or 'numbers game', he, the said Frank Andrews, alias Frank Andriello, alias Screw Andrews, then and

there being a second offender by reason of having been convicted of promoting a scheme of chance in violation of Section 13064-1 of the General Code of Ohio on the twentieth day of September in the year nineteen hundred and forty-four in the Municipal Court of the City of Cincinnati, Ohio, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

To this indictment the Defendant entered a plea of not guilty and after a Demurrer and Motion to Quash had been overruled, the cause proceeded to trial before Honorable Nelson Schwab, of the Hamilton County, Ohio, Court of Common Pleas, and a jury.

On March 14, 1945, the jury returned a verdict finding the Defendant guilty as charged. A Motion for a New Trial was seasonably filed and, upon argument by counsel, was overruled and the Defendant sentenced in accordance with the statute.

The case was reviewed by the Court of Appeals for the First Appellate District of Ohio, which affirmed the judgment of the trial Court and the Supreme Court of Ohio, after the submission of briefs and the hearing of oral arguments, overruled a Motion to Certify the Record. The case is now before this Court upon an Application by the Defendant for a Writ of Certiorari.

II.

THE FACTS

The facts, as developed by the State show that the Defendant, Andrews, was a gambler by profession; that he had a criminal record; that for some time prior to De-

cember 29, 1944, he had operated a numbers or policy ring in the City of Cincinnati; that the game called numbers or policy is a scheme of chance in which the player or bettor selects a series of three numbers and deposits a wager on these numbers with a "writer". The writer makes out a slip in triplicate containing the numbers selected, the symbol of the writer, the amount wagered and some means of identifying the player. One of the slips is given to the player, another kept by the writer and the third turned over with the bets to a "runner", who collects from a number of writers and turns the slips and money in at a clearing house presided over by the "promoter" or his employes. The winning number for any particular day is the middle three digits of the total number of shares of stock sold on the New York Stock Exchange for that day and the winners are paid on a basis of five hundred to one, less 10% of such winnings which go to the writer. (The odds against winning are, of course, one thousand to one).

The evidence further showed that one of the rules of the game is that when the police confiscate the slips from any runner, the backer or promoter is excused from paying any bets recorded on such slips. This rule becomes important in the light of the conduct of the Defendant as hereinafter set forth.

In August, 1944, the Defendant's headquarters or clearing house on Boone Street, Cincinnati, Ohio, was raided and the Defendant charged with violating Section 13064-1 of the General Code, as a first offender. He pleaded guilty to this charge on September 20, 1944, in the Municipal Court of Cincinnati, Ohio, and paid the fine which was assessed against him.

The Defendant claimed at the trial that after this conviction he sold out his numbers business to his brother,

Dan Andrews, who continued to operate it in Norwood, Ohio, but the evidence showed that all monies taken in by the business were deposited in a bank account in the name of the Defendant and his former partner, Maria Red, and no funds could be withdrawn from this account without the Defendant's signature, thus proving beyond all doubt that Defendant continued to control the business.

On December 29th, 1944, number 000 was the winning number and since this was a very popular number with the players, Andrews decided to take advantage of the rule that when the slips were seized by the police the house was not obliged to pay off. Accordingly, he personally went to the Cincinnati Police Department on that day and arranged to have his runner, Iaccobucci, picked up. He not only told the police where Iaccobucci was, but personally took a detective to the street corner where Iaccobucci was seated in the Defendant's own car with the slips for that day.

The Defendant never, at any time, denied that he operated a numbers ring. In fact, he bragged of the amounts he had paid to winners, amounting to forty thousand or fifty thousand dollars in approximately seven months (See R. p. 96). He merely claimed that he had sold the business to his brother on the day following his first conviction in September, 1944.

However, when confronted with his own bank account, he was forced to admit that he continued to deposit money from the numbers business in the account and signed checks against it long after that time (R. pp. 102 and 103). The truth of the matter was quite apparent to all who heard the evidence, including the jury. After his first conviction, the Defendant was afraid to keep the business in his own name for fear of being charged as a second

offender. However, he was also afraid to trust either his own brother or Iaccobucci, whom he had hired as "front men", with the money and this lead to his undoing.

As added evidence that he had not quit the numbers business, the State introduced testimony of two of his writers, William Crane (R. p. 14) and Roy Bieler (R. p. 30), who stated that they were writing numbers for the Defendant on December 29th, 1944, the date named in the indictment. These witnesses even identified slips which the police found in the possession of Iaccobucci on December 29, as slips which they personally had written for the Defendant on that day.

The witness Cleaver M. Hoard (R. p. 37) testified that she played the number 250 on December 20, 1944, with one of the Defendant's writers; that the number won on that day and that she was not paid. This was the day that the Norwood Clearing House was raided. Several days later the writer, Crane, came to her home with the Defendant, Andrews, and Andrews informed her that he was running the business in Norwood; that the place had been raided on December 20th and that under the rules of the game he did not have to pay any winners. He did, however, condescend to give her a present of $25.00 upon her promise that she would continue to patronize his ring. Miss Hoard further testified that she did continue to patronize the Defendant's ring and that she played the winning number 000, on December 29th and again was not paid.

A number of other witnesses testified in the same vein and the jury could not help but come to the conclusion that Andrews not only operated a numbers ring on December 29th, 1944, but that he was too crooked to pay off when he lost.

III.

ARGUMENT.

The Defendant's Application for a Writ of Certiorari is based entirely on his contention that Section 13064-1 of the General Code of Ohio, under which he was indicted, tried and convicted, is unconstitutional.

Prior to September 21, 1943, Section 13064 of the General Code of Ohio read as follows:

> "Whoever establishes, opens, sets on foot, carries on, promotes, makes, draws or acts as 'backer' or 'vendor' for or on account of or is in any way concerned in a lottery, 'policy', or scheme of chance, by whatever name, style, or title denominated or known, whether located or to be drawn, paid or carried on within or without this state, or by any of such means, sells or exposes for sale anything of value, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

In 1943 the Ohio Legislature amended this section by inserting the phrase "for his own profit" and enacted a new section, i. e. 13064-1, dealing particularly with the offense of promoting "policy or numbers game" and reading as follows:

> "Whoever establishes, opens, sets on foot, carries on, promotes, makes, draws, or acts as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy', 'numbers game', 'clearing house' or by words or terms of similar import whether located or to be drawn, paid or carried on within or without this state, or by any

such means, sells or exposes for sale anything of value shall, upon first conviction thereof, be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than six months, nor more than ten months, and upon second or succeeding convictions shall be fined not less than five hundred dollars nor more than one thousand dollars and imprisoned in the penitentiary not less than one year nor more than seven years."

Counsel for Defendant contend that Section 13064, Ohio General Code, as amended, is unconstitutional.

We see no point in debating this question as it is entirely irrelevant to the issues of this case. Even if this Court were to determine that Section 13064, as amended, is unconstitutional, such a determination would have no bearing on the constitutionality of Section 13064-1. The fact that both sections were enacted at the same time has nothing whatever to do with the case and no violator of Section 13064-1 may be comforted by the fact that Section 13064 may be unconstitutional.

Counsel for the Defendant complain because Section 13064 General Code, which makes it an offense to promote a scheme of chance by whatever name, style or denomination known, provides a lesser penalty than Section 13064-1 which deals particularly with the promotion of the policy or numbers game. They also contend that the offense charged in the indictment here under Section 13064-1 might also have been charged under Section 13064.

We should like to call the Court's attention to the Ohio larceny section (No. 12447) which provides that whoever steals anything of the value of more than $35.00 may be imprisoned not less than one nor more than seven years.

The horse stealing section (No. 12448) provides that whoever steals a horse of whatever value may be imprisoned not less than one nor more than fifteen years; and the automobile stealing section (No. 12619) provides a penalty of one to twenty years imprisonment for the theft of a motor vehicle, without regard to value. This latter section further provides a penalty of five to thirty years imprisonment for a second or subsequent offense. Both horse stealing and auto stealing are larceny and yet our State Legislature and the Legislatures of practically all other states, have seen fit to provide more severe penalties for the stealing of these particular items of property without regard to their value. So in this case the Legislature has seen fit to provide a more severe penalty for the promotion of a particular kind of gambling game (numbers or policy) without regard to personal gain. It is obvious that the Legislature, in the exercise of its proper police powers, considered this particular form of gambling to be more detrimental to the public good than other forms of gambling.

We do not see how it can be reasonably argued that the Legislature of Ohio, in the exercise of its police powers in enacting the anti-numbers racket statute, could be said to have unreasonably invaded the Defendant's rights under the federal Constitution. The clause of the Fourteenth Amendment forbidding any State to deny any person within its jurisdiction the equal protection of the laws, does not limit and was not designed to limit the police power of the State, nor does it affect the proper exercise of such power. *People* v. *Havnor*, 149 N. Y. 195 (43 N. E. 541) *writ of error dismissed in* 170 U. S. 408.

The equal protection clause of the Federal Constitution does not take from the State the power to classify, in the adoption of police laws, but admits of the exercise of a

wide scope of discretion in that regard and avoids only what is done without any reasonable basis and, therefore, is purely arbitrary. *Motlow* v. *State*, 125 Tenn. 547 (145 S. W. 177) *Writ of Error dismissed in* 239 U. S. 653.

No proposition of constitutional law is more firmly established than that the provisions of the Fourteenth Amendment do not operate as a limitation upon the police powers of the State to pass and enforce such laws as will inure to the health, morals and general welfare of the people. *Pacific Gas & Electric Co.* v. *Police Court*, 251 U. S. 22.

In enacting Section 13064-1 the Legislature of Ohio was seeking to stamp out a particularly vicious racket. If this Section did not apply equally to all persons within the jurisdiction of Ohio, it might be said to be violative of the equal protection clause of the Federal Constitution, but it does apply equally to all persons and, we submit, is a perfectly valid exercise of the police power of the State of Ohio.

Counsel for Defendant also argue that the Prosecutor might have noted on the indictment that it charged a violation of Section 13064 of the General Code. This is a specious argument because Section 13064-1 is the only section in the Ohio Code which provides a penalty for the specific offense of promoting the numbers game. Since the indictment is drawn in the very words of this section, it would not have mattered what section number was endorsed on the back of the indictment by the Prosecutor, or whether any number had been endorsed on the indictment. It would still have charged a violation of the only section it could have been drawn under, i. e., Section 13064-1. In any event, it is our opinion that the Prosecutor had no choice in the matter. Where an act is unlawful under a general statute, but also violates the pro-

visions of a special statute, it is the duty of the Grand Jury to indict under the special statute. In this case the charge was laid under the only statute which deals specifically with the type of gambling operation which the Defendant was promoting.

CONCLUSION.

In conclusion, we respectfully submit that the Defendant received a fair trial; that in enacting Section 13064-1 of the General Code, the Legislature of Ohio was exercising its valid police powers; and that the application for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.